

# LEGISLATIVE UPDATE

## COVERING CRIMINAL JUSTICE LEGISLATIVE ISSUES

SUMMER 2003, No. 17

DEPARTMENT OF PUBLIC ADVOCACY

### DPA AVOIDS BUDGET CUTS IN 2003 GENERAL ASSEMBLY

In the last issue of the *Legislative Update*, it appeared that the Department of Public Advocacy would have its budget cut for FY03 & FY04 based upon the fiscal crisis then facing the Commonwealth. At that time, it was reported that if a 2.6%, 5.2%, or possibly even a 9% budget cut was imposed, that the Department would have no choice but to turn back cases for which it had not been funded.

I am pleased to report that the dire scenarios presented in February did not come to pass during the 2003 General Assembly. Rather, the General Assembly passed a budget that recognized that both prosecutors and defenders have no control over their caseload, that both prosecutors and defenders were essential to public safety, and thus neither could afford a dramatic cutback in funding.

#### **The Budget for FY03 Continues the Cuts from the Previous Two Years**

To understand the budget passed in House Bill 269, it is important to remember what occurred during the previous biennium. In FY01, DPA was cut by 1%, or approximately \$447,000. In FY02, DPA was cut by another 3%, or approximately \$750,000. This funding level was continued in the Governor's Spending Plan, which was implemented between July 2002 and March 2003. Most significantly, 26 positions were not funded.

House Bill 269 did not address the 4% budget cut from FY01 & FY02, nor did it address the 26 unfunded positions. Rather, House Bill 269 funded DPA at the same amount as the Governor's Spending Plan. DPA continues to have 26 positions that are needed, but for which there is no funding.

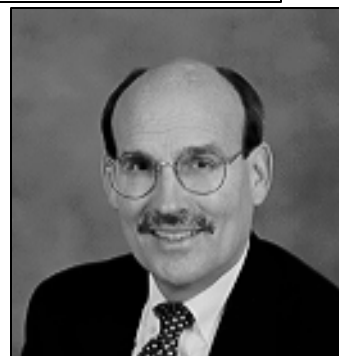
What is the impact of not funding the 26 positions? DPA typically has anywhere from 15 to 30 vacancies throughout the system at any given time. In House Bill 269, DPA does not have the necessary funding to pay for the salaries of those 15 to 30 vacancies. However, the caseloads represented by the vacancies remain. In response, DPA either increases the caseloads of remaining lawyers or DPA contracts with private lawyers to cover those caseloads. This is not a situation that can be sustained over time. DPA hopes

to recover funding for those 26 positions in the 2004 General Assembly.

#### **Progress is Made Toward Completing the Full-Time System for FY04**

The budget situation improves somewhat in House Bill 269 for FY04. The 26 positions continue unfunded. However, DPA is funded to open 2 additional full-time offices. An office will be opened in Boone County to cover Boone, Gallatin, Carroll, Owen, and Grant Counties. And an office will open in Cynthiana to cover Harrison, Pendleton, Robertson, Nicholas, and Bourbon Counties. DPA hopes to open these two offices sometime between October of 2003 and January of 2004. Each office will have 4 attorneys. At that point, DPA will have full-time office coverage in 117 counties. Only Barren, Metcalfe, and Campbell Counties will remain.

Completing the full-time system has been the primary policy goal that I have had since becoming Public Advocate in 1996. With the passage of House Bill 269, that goal is within reach. It is hoped that a way can be found to cover the remaining 3 counties sometime during FY04 as well, completing the system during this next fiscal year.



*Ernie Lewis, Public Advocate*

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## CRIMINAL JUSTICE SYSTEM CELEBRATES GIDEON DAY

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Forty years ago as of March 18, this nation put teeth into the Sixth Amendment. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that it was an “obvious truth” that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”

On January 17, 2003, the Kentucky Bar Association Board of Governor’s passed a resolution recognizing March 18, 2003, as Gideon Day throughout the Bar. The Resolution called upon “the Governor and the General Assembly to ensure that budgetary reductions that threaten the quality of services provided by an impose excessive caseloads upon Kentucky’s public defenders be avoided, and that reasonable and adequate funding levels be made available to the Department of Public Advocacy during this biennium.” The Resolution also called upon members of the KBA, “including representatives of prosecution, public defense, the courts, and the private bar,...to engage in appropriate commemorative activities to educate the public about the importance of equal access to justice in our great democracy, and the mandates of *Gideon*’s constitutional mandate even in the face of periodic budgetary constraints.”

House Joint Resolution 111 was passed unanimously by the House. It recognized March 18, 2003 as “Gideon Day” throughout the Commonwealth of Kentucky. It rededicated Kentucky “to the principle of equal justice for all regardless of income.” It saluted public defenders and their staff “for their dedication to public service.”

### The 5 Problems

The National Legal Aid and Defender Association has identified 5 problems that indigent defense systems face across this county as *Gideon v. Wainwright* is being celebrated. These 5 problems are the context in which Gideon Day was celebrated in Kentucky. The 5 problems are:

- No counsel at all. “The dirty little secret of the criminal justice system is how many people accused of a crime in this country get no lawyer at all.”
- Excessive caseloads. “Public defense caseloads frequently far exceed national standards...Unmanageable caseloads mean that many defenders simply don’t have time to do the most basic tasks, such as talk to their clients or do investigation. Many individuals get nothing more than a few minutes of their attorney’s time and a hurried guilty plea. The result: miscarriages of justice and convictions of the innocent.”
- Lack of Enforceable Standards. “Although individuals in every state are entitled to counsel, the quality of representation varies widely across the country.”
- Underfunding. “Inadequate funding leads to attorneys who do not have appropriate access to training, legal research, investigators, experts or scientific testing.”
- Lack of Independence. “National standards provide that public defense counsel should be independent from political pressures.”

### The Criminal Justice System Gathered

On March 27, 2003, 120 persons involved in many levels of the criminal justice system gathered at the Holiday Inn in Frankfort to engage in a commemorative activity called for by the KBA Resolution. Of course there were many public defenders from across the Commonwealth in attendance. There were also prosecutors, judges, citizens, mental health and mental retardation professionals, former public defenders, private lawyers, court officials, pretrial release officers, corrections officials, clients, and many others who came to celebrate Gideon Day. Chief Justice Lambert, Commonwealth’s Attorney George Moore, and Secretary Janie Miller gave wonderful speeches not only celebrating the right to counsel, but also calling upon those who gathered to look into the future and devise ways to improve our system of indigent defense.

### Issues that were Raised

Those who gathered not only celebrated the importance of the right to counsel. They also looked at the present, identified problems, and looked into the future and identified solutions. Some of the topics discussed were as follows:

- The importance of communication when representing both the child and adult client.
- The role of the public defender in helping to prevent crime.
- The need for increasing the pay of private lawyers representing indigents on contract or when there is a conflict of interest.
- The problems and challenges of being a public defender in family court.
- How to achieve quality representation in capital cases.
- The importance of advocating vigorously for juveniles.
- The problems of cross-racial identification.
- The need for defenders to work closely with mental health, mental retardation, and other providers, and integrating mental health systems with the criminal justice system at the local level.
- Speedy Trials.
- How to obtain adequate funding for indigent defense
- Whether an ombudsman is needed in DPA
- Working with the media
- The risk of being too close to a prosecutor
- Access to courts for persons who are incarcerated

Our celebration of the *Gideon* decision is not yet complete. Anthony Lewis, the author of *Gideon’s Trumpet* and New York Times reporter, will be present at the Kentucky Bar Association Convention as well as the DPA Annual Conference. Jeff Sherr and Patti Heying will perform a play celebrating the *Gideon* decision. Individual defenders and staff will be speaking all during 2003 throughout the Commonwealth in schools, clubs, and other settings.

All this is being done in tribute to one poor man’s efforts to find justice in this great land. ■

Ernie Lewis, Public Advocate

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5. RCr 4.16(1) provides that bail “shall be sufficient to insure compliance with the conditions of release set by the court. It shall not be oppressive and shall be commensurate with the gravity of the offense charged. In determining such amount the court shall consider the defendant’s reasonably anticipated conduct if released and the defendant’s financial ability to give bail.”

6. KRS 431.525(1) provides that bail should be (1) “sufficient to insure compliance with the conditions of release set by the court; (2) not oppressive; (3) commensurate with the nature of the offense charged; (4) considerate of the past criminal acts and the reasonably anticipated conduct of the defendant if released; and (5) considerate of the financial ability of the defendant.”

7. The Kentucky Rules of Criminal Procedure have long recognized the need for expedited appeals of pretrial bail rulings to prevent hardships, inequities in release practices, and jail overcrowding.

8. The Pretrial Services Division of the Administrative Office of the Courts compiles information on the affidavit of indigency on defendants before the Court. Affidavits of indigency were obtained from 7% of those arrested in 1987 as compared to 22% in 2001.

**Pretrial Release Recommendations of Workgroup.** There were 9 Pretrial Release Recommendations made by the Workgroup.

1. Judges should have more information from Pretrial Release Officers than just basic interview information and points. Recommendations made by the Pretrial Release officers to the Judges should be broadened to include non-financial alternatives regardless of eligibility.
2. Pretrial Release Officers should intensify their efforts to apprise the Judges of defendants not released (subsequent to the current twenty-four hour review process) through frequent reviews with the judges about bond.
3. The waiver for the release of interview information and points to attorney of record should be incorporated into the current consent for interview. The order appointing counsel for the Defendant shall direct the pretrial officer to provide counsel with a copy of the pretrial services interview form.
4. There should be full review on the timing, collection and process for collecting information on the Affidavit of Indigency. A copy of the affidavit should be given directly to the Public Defender upon request of the defendant or entry of an order of appointment by the court.
5. The Court of Justice should analyze the current forfeiture process for secured and unsecured bail in the Commonwealth of Kentucky.
6. AOC should conduct pilot projects to analyze the effectiveness of the point system as a predictor of appearance in urban, suburban and rural settings.
7. Notification procedures on pretrial appearances subsequent to arraignment of the defendant on non-financial releases should be increased.
8. An automated interview/case management process should be developed by AOC for information collected on defendants. An electronic means of sharing appropriate information, including the Affidavit of Indigency, should be developed in consultation with DPA.

9. Defendants should be represented by counsel at their arraignment where pretrial release is determined, and there should be adequate resources provided to support effective implementation of such representation by counsel for indigent defendants. Arraignment should be held expeditiously.

**Implementing the Workgroup Recommendations.** If the Recommendations are to become reality, the criminal justice system will have to make changes. Judges, prosecutors, pretrial release officers, and defenders will have to work to make the Recommendations reality.

In the conclusion of its Report, the Workgroup called for: “The AOC/DPA Workgroup urges implementation of these Eligibility and Pretrial Release Recommendations for the benefit of the Kentucky Criminal Justice System and the people of Kentucky.” Some education and changes have already taken place.

Cross system training on the role of pretrial release will be done at 3 locations pursuant to a Byrne Grant. It will include members of the justice system, service providers, the media and the community.

AOC has instructed their Pretrial Release Officers to provide a review for probable cause within 48 hours of arrest by bringing the post-arrest complaint or citation to the attention of the judge to comply with *Gerstein v. Pugh* and *County of Riverside v. McLaughlin*. This is generally completed within twelve hours of arrest at the initial presentation for consideration of release. DPA has given all its defenders the report and is educating its litigators on the report through *The Advocate* and this legislative newsletter as well as at its litigation education. All pretrial release officers had received education on the AOC/DPA Workgroup Report, and had been requested to modify certain procedures, particularly in relation to their local public defender’s offices.

Supreme Court Rules of Criminal Procedure were modified to permit the client’s interview to be provided without seeking written permission to expedite access to critical information. The information contained on the interview indicates eligibility for release, impediments to release through disputed information or warrants, whether a probable cause finding was made, and many times the information on which the judge based the finding. Pretrial Services has reported little or no interest from defenders to obtain this data, attempt to use it in release advocacy, and statewide data has indicated a decline in appeals subsequent to the issuance of the AOC/DPA report in June 2002.

AOC and DPA are exploring the possibility of DPA directing attorneys attending the AOC regional meetings of pretrial officers in the fall of 2003, where many of the issues raised above can be discussed. These joint meetings could result in a working relationship that provides for better pretrial release advocacy.

In reflecting on the AOC/DPA Workgroup Report, Public Advocate Ernie Lewis said, “We are at an historic moment of collaboration with Pretrial Release Officers that is an opportunity

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for defenders to work cooperatively to provide judges with more and better information in making pretrial release decisions. I encourage our trial litigators to redouble their commitment to this important area of practice for our clients who are presumed innocent as they await their trial.”

Cicely Jaracz Lambert, Director of AOC, said “the fragmented nature of the criminal justice system has clearly defined roles for each of the participants. The system works best at achieving justice when each component performs their best work in that role. This does not mean that collaboration and unified efforts to create a better environment for justice to develop is inappropriate. In a country that prides itself on the rule of law it is when we do not work together to improve the system that the public should hold us accountable.” ■

**Ed Monahan, Deputy Public Advocate**

### **The Public Value of Kentucky Public Defenders**

Public defenders provide significant value to the people of Kentucky. Anthony Lewis, New York Times Pulitzer Prize winning columnist, has observed that “The lawyers who make Kentucky’s indigent defense system work are in a great tradition. They prove what Justice Holmes said long ago: ‘It is possible to live greatly in the law.’” The values that public defenders provide to the citizens of the Commonwealth add to Kentucky’s wealth in uncommon ways.

1. Fair process that brings results we can rely on in criminal cases is the service defenders provide Kentuckians.
2. Defenders help over 100,000 poor Kentuckians with their legal problems when those citizens are accused of or convicted of a crime.
3. In the district and circuit courts in all 120 counties and in the Kentucky Supreme Court and Court of Appeals, defenders serve the Courts’ need to fully understand both sides of the dispute before the decision is made.
4. Defenders serve the public’s need for results in which they can have high confidence.
5. Defenders serve the citizens we represent by insuring their side of the dispute is fully heard and considered before their life or liberty is taken from them.
6. Defenders help children in juvenile court, addressing many of their family, educational, and social problems in order to help them become productive and law-abiding adults.
7. Defenders help the criminal justice system insure that fairness and reliability is not only what we say but what we do every day in the Courts of the Commonwealth.

***Legislative Update***  
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